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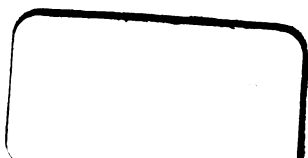


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INTERNATIONAL TRIBUNALS TO ENFORCE PEACE

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HEARING

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BEFORE THE

**SUBCOMMITTEE OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

SIXTY-FOURTH CONGRESS

SECOND SESSION

ON

S. J. RES. 131

**PROPOSING AN AMENDMENT TO THE CONSTITUTION OF
THE UNITED STATES, AUTHORIZING THE CREATION,
WITH OTHER NATIONS, OF AN INTERNATIONAL PEACE-
ENFORCING TRIBUNAL OR TRIBUNALS FOR THE
DETERMINATION OF ALL INTERNA-
TIONAL DISPUTES**

THURSDAY, JANUARY 18, 1917

Printed for the use of the Committee on the Judiciary



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GOVERNMENT PRINTING OFFICE
1917**

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MAR 21 1917

INTERNATIONAL TRIBUNALS TO ENFORCE PEACE.

THURSDAY, JANUARY 18, 1917.

UNITED STATES SENATE,
SUBCOMMITTEE OF THE COMMITTEE ON JUDICIARY,
Washington, D. C.

The subcommittee met in the room of the Committee on the Judiciary in the Capitol at 10.30 o'clock a. m., when there was present: Senator Overman, chairman.

The subcommittee thereupon proceeded to the consideration of Senate joint resolution 131, which was introduced by Senator Shafroth and referred to the Committee on the Judiciary on May 18, 1916, and by them referred to this subcommittee on December 13, 1916, and January 15, 1917, as follows:

(1)

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States, authorizing the creation, with other nations, of an international peace-enforcing tribunal or tribunals for the determination of all international disputes.

1 *Resolved by the Senate and House of Representatives*
2 *of the United States of America in Congress assembled,*
3 That the following amendment to the Constitution of the
4 United States be proposed to the several States of the Union,
5 with recommendation that they adopt the same by vote of
6 their respective legislatures:
7 “The President is authorized to negotiate and, after
8 ratification by two-thirds of both Houses of Congress, to sign
9 a treaty or treaties with all or a part of the other sovereign
10 nations of the world, engaging the United States to submit
11 for final determination all its international disputes threaten-
12 ing war to an international tribunal or tribunals, and also
13 engaging the United States to assist in supplying funds for

(2)

1 the support of said tribunal or tribunals and of any inter-
2 national civil and military establishment, to be controlled
3 by an international authority, that may be required by the
4 treaty or treaties as a sanction for the execution of the

5 decrees and the fulfillment of the demands of the said inter-
6 national organisms when such decrees or demands are made
7 in conformity with the agreements instituting said organisms,
8 and engaging the United States to recognize the authority
9 of said international organisms (or one or more of them) to
10 make final interpretation of the powers conferred upon
11 them."

Senator OVERMAN. Senator Shafroth, will you proceed?

**STATEMENT OF HON. JOHN F. SHAFROTH, A SENATOR OF
THE UNITED STATES FROM THE STATE OF COLORADO.**

Senator SHAFROTH. Mr. Chairman, I desire to say a few words concerning Senate joint resolution 131, proposing an amendment to the Constitution of the United States, authorizing the creation, with other nations, of an international peace-enforcing tribunal or tribunals for the determination of all international disputes.

Mr. Chairman, the moving spirit who has induced me to examine into the question as to the kind of an arbitration tribunal which should be created is Mr. Oscar T. Crosby, who has made a life study of this question, who has traveled all over the world, and is familiar with the governments therein. He is a graduate of the United States Military Academy at West Point, but is an ardent advocate of peace. It has been largely through conferences with him that I have arrived at the conclusion that this joint resolution should be adopted. I wish, after the few minutes that I shall speak upon the subject, to ask you to hear Mr. Crosby upon this matter.

Senator OVERMAN. Senator, before you begin I should like to ask you why you think an amendment to the Constitution is necessary?

Senator SHAFROTH. I will come to that, if you will allow me.

When Mr. Crosby first presented this matter to me and suggested a constitutional amendment my thought was that the treaty-making power of the United States is broad enough to include the negotiating of an agreement for a peace-enforcing tribunal. Mr. Crosby took an opposite position and through his talks with me he converted me to his view. I maintained that if a government, by its treaty-making power, has a right to acquire territory or to cede territory, which right affects the sovereignty of the nation over the same, surely it would have a right to enter into an agreement such as is proposed. But I have come to the conclusion that it does not possess that power unless a constitutional amendment grants it.

What we are proposing is the creation of a court which shall recognize and keep inviolate the territorial boundary of each nation as against foreign powers as it exists at the time of ratification of the treaty unless modified by mutual consent, and which tribunal shall determine all disputes between nations.

We propose that the international court shall have the power to enforce its decrees; that each nation shall contribute its proportionate part of the navy and army with which to enforce its decrees, and also such funds as are necessary for the support of the tribunal; that each nation shall maintain an army only of sufficient size to maintain order among its inhabitants and to prevent raids of ban-

dits from other countries; that it shall maintain a navy only of sufficient size to enforce its own laws.

If such a tribunal is created it will end wars. A conflict between nations is a losing transaction to both the vanquished and the victors. When we look across the waters and see the death and destruction that are now taking place, the intense hatred that is being engendered, and realize the enormous national debts being contracted which will oppress the people for hundreds of years, there ought to be a universal approval of any measure that will produce a lasting peace. The competition among the nations of the world for the largest navy and greatest army must cease in order to preserve our civilization.

We have courts in our own country with power to enforce their decrees in disputes between our own citizens. We have the court armed with the sheriff in the case of a State court, or with the marshal in the case of a United States court, and each has a right to invoke all the powers of the State or the powers of the National Government to enforce them.

There is in the Constitution a clause which, in my judgment, prevents the United States Government from entering into such an agreement or such a treaty with other nations, and that is the clause which says that the Congress of the United States shall have the power to declare war. Now we propose to have the Congress and the States consider the advisability of taking away that power in order to establish a lasting peace. That power is inconsistent with the very court we propose for obtaining peace by the enforcement of its decrees in international disputes. On that account, in order to repeal the clause of the Constitution which says that Congress shall have the power to declare war, we maintain that it is necessary to have a constitutional amendment. Therefore, we are asking for the passage of this joint resolution, which does not compel the United States to take any action, which does not require the United States to enter into any agreement; but in the event that there is a bona fide effort upon the part of the nations of the world after the close of this European war to come to a distinct and clear agreement with relation to a lasting peace, we want to have all the powers that those governments possess to enter into such an agreement. We do not want to be met with the objection of other nations that "You are a Government of limited delegated powers, and we do not find that this power has been delegated in your Constitution, but we do find that Congress has the sole power to declare war; and here you are proposing by this peace treaty to take away that power without authority."

It is on that account that we want a constitutional amendment such as this in order to permit the Government, if it should deem it wise and proper, to enter into an agreement to establish an international court with power to enforce peace.

Senator OVERMAN. You want to take away the power of Congress to declare war?

Senator SHAFROTH. Yes, sir; I want to take away the power, in order to have all international disputes settled by a tribunal which shall have the means to enforce its decrees. If you leave in Congress the power to declare war, then you are going to have the same obstructions to peace that you have now. It will be necessary to

maintain your Army and your Navy at a great strength, and you will have to burden the world with the enormous military and naval armament that now exist. Their existence is of infinitely more danger to our Government than any such agreement as might be entered into under the authority given in this joint resolution.

I must say that all that it is necessary for me to do to demonstrate the defects in the plan which the League to Enforce Peace proposes is simply to refer you to the speech of Senator Borah the other day in the Senate, wherein he demonstrates that a proposition for each nation to enforce peace remedies the difficulty only in a slight degree; that under such a league it is necessary for each nation to have a large army and a great navy if the nations are going to enforce peace in their individual capacities; and the terrible burden which is now upon the people of the world will continue to exist and, consequently, the remedy will be wanting.

The only remedy that I have been able to see is the surrendering of that part of our sovereignty which now enables us to declare war. That surrender would be in the interests of civilization, of humanity, and of peace.

With relation to this international court, I will state that, after conferring with Mr. Crosby a number of times and after making certain modifications and changes, I introduced a joint resolution which established the base of the groundwork of negotiations which the Government might undertake. I am not before this committee for the purpose of discussing at length that former joint resolution, but I want to call attention to the fact that my theory is that this tribunal should have power to determine everything—all controversies, no matter what they are—except that the tribunal shall start in with the understanding as a jurisdictional matter that it recognizes the boundaries of each one of the nations at the time the convention or treaty is signed. Under that plan it can not go into past contentions as to territory. There can not be a question of dispute as to whether the United States or any part thereof belongs to Great Britain or a portion belongs to Mexico. Those questions are all eliminated.

It seems to me that we will not have any difficulty whatever in submitting to this tribunal the ordinary disputes between nations, and even questions of honor, just as questions of honor are determined in courts of justice between individuals. They must be submitted to some such body if we are going to have peace, and if we are going to get rid of the enormous annual expenditure that is burdening the people of the world. For centuries it was recognized that men could not settle questions affecting their honor except by resort to the code duello. Thousands of the very brightest men of the world have been the victims of that false sentiment. Does anyone in a civilized country now countenance any such practice? It would be ineffective to create a tribunal to settle insignificant disputes and leave the controversies which either side can claim affects its honor, to be determined by the arbitrament of force. So-called questions of honor are the very ones that should be determined by a world court in order to prevent a land-grabbing nation from claiming an unimportant dispute to be a matter affecting its honor.

I provide in the other joint resolution that it shall be a court of large numbers. Each nation should have the privilege of sending not less than one nor more than five members to this court of arbitration, and when a dispute arises between any two nations the court

of arbitration shall call upon the contending nations each to name two arbitrators, and those four to select a fifth; or, if they can not agree the fifth shall be selected either by the president of the tribunal, by a vote of the entire court itself, or by lot. Upon that being done, those five men, for instance—or, if it is desired to have the court smaller, say three men, or, if larger, say nine men or eleven men—shall then sit as the court itself; and it is the determination of those men that shall constitute the decree of the tribunal. The United States will not be in the position of having its matters determined by a world court where there would be ten judges from other nations as against one from its own. Each nation, small or large, will have an equal representation on the trial court, and the odd man will be selected as I have stated. That being the case, every nation will have an opportunity to present its claim and to have it fairly determined.

We will not be swept into the monarchial system of Europe by reason of the fact that their representatives will constitute a large majority of the delegates to this tribunal. The very smallest nation will be protected in its rights just as perfectly as the large nations.

If the Monroe doctrine is interfered with, it will be by the substitution of a greater power than ours, to wit, the power of the international court, which will protect the independence and territorial integrity of each of the South and Central American Republics and thereby relieve us of our national responsibility as to them.

The entangling alliances Washington so wisely warned us against were those which contemplated the aiding of one or several of the European nations in their offensive and defensive policies as against other nations. It was the taking of sides in their controversies. Some of the American people at that time were very eager to aid France in her struggle with England, because Lafayette had helped us in the Revolutionary War, or because Great Britain had violated our neutrality rights. At one time during his administration Washington was hissed and hooted by 10,000 people because he would not espouse the cause of France. Alexander Hamilton was stoned by a mob because he strongly urged the policy of neutrality for our country. No advocate of an international peace-enforcing tribunal doubts the wisdom of their advice. But it can not be fairly contended that the entangling alliances referred to in those days related to a concert of nations for the enforcement of arbitration of disputes in the interest of peace.

Mr. Chairman, that is all I care to say at the present time. I hope you will hear Mr. Crosby, because he has given much more time and much more attention than I have to the consideration of this resolution.

Senator OVERMAN. We shall be glad to hear from Mr. Crosby.

STATEMENT OF MR. OSCAR T. CROSBY.

Mr. CROSBY. Mr. Chairman, following the explanation of the situation already given by Senator Shafroth, I shall address myself directly to the question as to whether treaties made by the President and the Senate are indeed, in any way or in any case, to be challenged either by Americans or by foreigners, and I shall point out that our Constitution so limits the treaty-making power that certain international changes, now much in question (and ardently desired by myself), can not be effected.

The challenge by the foreigner will naturally take place before the fact, if at all; and I shall indicate in the first place that it is the custom of nations to consider narrowly, if the issues be very great, the powers of those who present themselves as the treaty-making agents of other nations with whom contracts are about to be made.

In our early history we met a very great embarrassment in this respect. That is to say, when the Colonies were bound into the first Confederation, it was found impossible to make satisfactory commercial treaties of the most ordinary character, because of the refusal of European nations to deal with us. They took notice of the Constitution which then bound the Colonies together, and they concluded that the treaty-making power of the President of the Confederation was not sufficient to justify them in dealing with us; and that, as we all know, was one of the reasons moving the fathers to establish the present Constitution.

It is therefore not simply a matter of domestic opinion as to whether a particular thing can be done which we undertake to do. In addition to the grave matters which Senator Shafroth has indicated, and which may be long in realization, namely, the establishment of an international organization of the kind that he and I have so often discussed, we have a present-day issue to consider, by virtue of the fact that, in more or less vague terms, the heads of all of the European States now at war, and the head of our own State, continue to discuss as a question of to-day the organization of the nations of the world on some new, unfamiliar basis. If that is to end in anything except empty words, it goes quite without saying that the right of the treaty-making power of the United States to make these unprecedented engagements will be challenged, not in any ugly sense, but will be investigated; will be passed upon; and if there be grave doubt as to the right of the President and the Senate to do the thing in question, then I am not risking much as a prophet if I state that the negotiations will be embarrassed.

I know nothing, of course, as to what is going on between the President and foreign powers, save that which we all see in the press; but even this morning's paper brings a fresh contribution, new fuel to the flame, in the second answer of the allies to the President's so-called peace note. They again indicate that this question is in their minds, and refer very particularly again to the fact that there must be something other than moral engagements to make good any endeavor to establish a new international order.

In my judgment, that is true. Obviously they mean just what this resolution means in substance; that is to say, a force back of some mechanism to prevent independent war making by separate nations, which has been the mark of sovereignty, and is to-day the mark of sovereignty, all over the world.

That is a very grave change that is proposed. The more it is studied, the more will its gravity appear; and while I have given a long time and much thought to this subject, the more I consider it, the less do I think it probable that the treaty ending the existing war can also be the instrument for the establishment of such a new international order. But it is going to be considered, even as it was considered a hundred years ago. It may end, Mr. Chairman, in some vacuous phraseology, such as the Holy Alliance used; but we have a great democratic world to-day. Empty phrases will be more widely

criticized. The powers of States to do effective things will be more closely investigated; and we should at least be in the position of showing that we are considering a great and doubtful point.

I am quite ready to recognize that foreigners can not make laws for us, of course; but they can determine whether or not they want to deal with us. They can even slightly embarrass us, let us say, by pointing out that we are trying to do things which we can not constitutionally do. One of the well-known British correspondents, long stationed in this city, has told me that he has recently advised his London publications—one a very influential morning paper, the other a very influential monthly journal—that our present pronouncements looking toward some new international order must be taken *cum grano salis*.

If there were nothing but that grave doubt concerning this matter in the minds of certain foreigners and Americans it is worth while, Mr. Chairman, that this question should receive such consideration and such action as would remove the doubt. Let me say that I have discussed this question with as many people as would listen to me—men of mark, men of thought—and I know that many such share the views expressed here by Senator Shafroth and myself.

Senator OVERMAN. Your idea is to take away from Congress the right to declare war and give it to this tribunal?

Mr. CROSBY. That is the idea that Senator Shafroth and I stood for, long before the President's utterances. It seems to be the idea involved in the program of League to Enforce Peace, and—now I speak with some hesitation—I believe it is the idea expressed by the President. We all know that his expressions have not been as yet formulated so that one can say specifically that he means this, that, or the other thing; but over and over again the implications are that he means this—that on the happening of some emergency, to be determined, by presumption, by some extranational body, we shall be bound to make war; whereas to-day the Constitution reposes in the Congress of the United States—which, of course, includes the other House—the fullest discretion in that regard.

It therefore appears that anything substantial, Mr. Chairman, anything that materially alters the present condition, will require that sort of thing to be done. If, on the other hand, no alteration is to be effected by the impending negotiations; if they are to end in a sort of love-in-a-cottage, maudlin statement, such as the Holy Alliance was satisfied with, I think we would have nothing to say about that. We would still be desirous of clearing the way for some later consideration which we intend to urge, and a lot of men all over the world intend to urge. When this war shall have ended we shall still be urging that new international order.

Senator Shafroth and I were acting in this matter long before the President's recent utterances were known to us. The resolution which you see before you was introduced during the last session, in May, and the Senator had been patiently listening to my representations about it for some months before.

Senator SHAFROTH. In the Sixty-third Congress, also.

Senator OVERMAN. Suppose we adopt this amendment. The question is whether other nations would surrender to this tribunal their right to declare war.

Mr. CROSBY. Yes, Senator. But this does not actually require anything to be done by us. It is merely permissive. It merely clears away a formal difficulty, due to the fact that we are a federated Government, having very specifically marked powers reposed here and there and there. With that amendment adopted and made a part of our Constitution, it might indeed not be used for 50 or 100 or 1,000 years; but whenever the question does arise—and that question has arisen since this resolution was introduced, as a matter of present-day politics—we will not be embarrassed as a nation by the discovery that the treaty-making power can not do the thing in question, even though then there should be a great demand for it by the people.

Senator SHAFROTH. It simply gives to the United States Government the same powers to enter into the treaty that a government uncontrolled by a constitution now possesses.

Mr. CROSBY. Perfectly so. I can see that the Russian Government will have no consideration of this sort before it. I can see that the British Government, if it undertakes this negotiation, although the Crown is the repository in general terms of the full treaty-making power of Great Britain, will not dream of making a revolutionary undertaking without the consent of Parliament. But that is all they need do. They can change the most ancient practice by act of Parliament.

They will have changed their constitution and will have met all the demands that a foreign Government can reasonably make as to the fullness of power in the execution of a treaty when Parliament shall have acted upon it. But we must do something else. We must clear the way. We must make a new gift of power from the people and the States to the United States in order that it may do a thing which obviously was not contemplated when our Constitution was made. Our Constitution was made, as all other governmental acts were done at that time, in the contemplation that each sovereign would continue to be a full war-making power, and that was considered of the essence of sovereignty.

Now our administration is proposing to change that status. Of course, we are embarrassed a little by a certain vagueness in the President's words. I want to say, however, that, in my estimation, you and I are justified in concluding that the administration is to-day stating to the world that so far as it can speak for the United States it is prepared to transfer to an extranational or supernational body a right to determine when the United States shall go to war. I can make nothing else of it. If it be not that, Mr. Chairman, what is it?

We who have thought long on this subject recognize that our propositions are revolutionary. I may add that they are both revolutionary and unconstitutional. Senator Shafroth and I think, with others who have gone with us in this matter, that our propositions are revolutionary, unconstitutional, and efficacious. We believe that some of the other propositions which are being mooted are revolutionary, unconstitutional, and inefficacious.

Senator OVERMAN. Granting that we accept this amendment and put it in our organic law, that would require all other nations to go into this arrangement and surrender their power to declare war?

Mr. CROSBY. It would not *require* anything even of us, Senator. It is simply permissive.

Senator OVERMAN. I understand that it is permissive.

Mr. CROSBY. Yes.

Senator OVERMAN. But in order to carry out your idea to the limit, to the last analysis, all other nations would have to surrender their right to declare war?

Mr. CROSBY. All who joined with us; and in the provisions which have appeared in an earlier resolution introduced by Senator Shafroth, we have indicated that in our judgment if seven or eight of the great nations of the world should combine it would not make any particular difference whether the others did or not.

Senator OVERMAN. But all the great nations would have to join?

Mr. CROSBY. Yes; and when they have joined they have given up a part of their sovereignty, and the people who are claiming—as many do who are working in the same general line—that anything can be accomplished in this direction without some surrender of sovereignty are trying the old, defeated effort to “have your cake and eat it, too.” It is quite impossible, we think—quite impossible.

Those of us who have gone along on this line say: “Yes; we understand that the nations are to give up something of their sovereignty, as the States of our Union have given up even more of their sovereignty”—as you and I, Mr. Chairman, have given up that sovereignty which I have seen exercised by naked savages in Africa, the sovereignty which refuses any curb upon it. We are glad to have done it, and we live in that relative tranquility which we call the peace and order of a civilized state because we have done it. Had we not done it, we would have still been in the caves. We are in the caves now as nations. We are Arizona Bill and we are Texas Jim as nations. Question: Do we desire to change that status?

I do not know, Mr. Chairman. I know that there is a great inertia of the human mind to be overcome. I know that there is a fetish about this sovereignty idea that will require, perhaps, a long time to overcome. We are not independent of each other, because we must arm against each other. The cost of competitive armaments places our fiscal systems in dependence each upon the other. But we are free to take the chance of killing or being killed on the initiative of each sovereign State. We think that possibly when the nations shall have ended this war by what I believe will be some rather hasty peace, and while they are still sore with the running wounds of the war, they may then turn seriously and anxiously to the establishment of some new international order which can be nothing else than an establishment corresponding to that which we have within the nations.

There is not any trick about it. There is no discovery to be made, nor is there any miracle to be performed. If several groups desire to maintain tranquility with respect to each other, they will have to erect over themselves, out of themselves, a common control. I have sometimes put it this way: If I am ever to be hung, I am to be hung by the sheriff of Fauquier County, Va., and I shall have paid for a considerable part of the rope that will string me up; and that is civilization. There is not any better formula for it.

Senator OVERMAN. Suppose this permission is given, and all nations enter into this agreement and surrender this power? What would prohibit the Czar of Russia or the Emperor of Germany from saying that that agreement is not worth the paper it is written on, and that he will declare war anyway? What is to hinder him from doing it?

Mr. CROSBY. The thing that would hinder him, according to the provisions of the earlier joint resolution already mentioned, would be the international army and navy that would go and punish him. If our baby is born at all, Senator, then it is born with teeth. It does not come into the world toothless. It comes into the world with teeth, and the old fellows who make up the present nations, have their teeth extracted at the same moment that the baby is born.

Senator SHAFROTH. By disarmament?

Mr. CROSBY. By disarmament. We conceive that you can not extract the national teeth until that international baby is born with teeth.

Why are you and I not in rebellion, pray? You and I know that at times we believe we are wronged by government. You and I know that we do not always obtain what we individually conceive of as justice in the courts. You and I know that the Congress of the United States passes laws which we object to as individuals. Yet we have bent to it, because it is good for us to do so. We have gotten tranquility by bending to it.

I say, therefore, that while we were born into this thing and did not ourselves think it out; while it came down to us from the ages, **yet** if you take it with the utmost sang froid, if you consider it as you would were you from Mars, you would say, "Yes; I will come into that arrangement. I prefer it to the splendid sovereignty of the savage."

I have seen both, Mr. Chairman, near at hand—the usual life which we all lead, and the savage life—and, trying to think it out with the utmost detachment, I say that if we are to have all that this room represents, and all that that view out of the window represents, and all that the books around us represent, all the uplift of intellectual life, I must do this other thing; I must submit myself to a power created over myself, by myself.

Now, it comes to this: Shall these last groupings which we call nations do that? I do not know whether they are ready yet. We believe that if they desire to have the same relative tranquillity which is enjoyed by the individuals and the groups within the nations, they must, perforce, follow the same well-worn path. There is not anything new in this. Oh, the mechanism is new—yes; just as the mechanism of one country may differ from that of another as to the exact organization of the courts and the exact organization of the legislative power; but it is the old story of what? Of the justice of the peace and the constable. They are the corner stones of civilization; and what is proposed is this: Shall those last groupings which we call nations, and which are not sacrosanct—they have their waxings and their wanings; they include now Smith, and then eject him, and take Jones; they are organizations for human happiness, the service in which we are all engaged—shall, or shall not, those groups follow the beaten path, on the assumption that we desire tranquillity?

I shall not for the moment go into that, Mr. Chairman, although I recognize, as I go about the world talking to all who will bear with me on this subject, that we have to meet the proposition that war is itself a desirable thing; but I am passing that for the moment. I think I can demonstrate the contrary, and am trying to do it with my pen. I am assuming that you, who have power over me, desire to eliminate international war, and that you in that respect stand

with the majority of those who have power over me in this Capitol. I am assuming that other men in power throughout the world will say: "Yes; we want to eliminate international war. How can we do it?"

The first great question to be answered we profess to have answered in general terms by the outline of an international court of which Senator Shafroth told you; and there is a lot of detail which has been worked out, we think, with about the same carefulness that the framers of our Constitution applied to the organization of our Government.

The question, however, which we are discussing with you to-day is in a sense a minor question. That is, it results purely from our federative act. Had we organized in some other way, had we not put the limitations that have been put upon the treaty-making power, we should not be before you to-day. We are trying to-day to remove a formal handicap resting upon the American people in respect to this question, so that if to-morrow or day after to-morrow or 10 years from now or 100 years from now it shall have been determined by us and by corresponding majorities of sentiment in other countries that some such mechanism as is outlined in this resolution shall in fact be established; if it shall have been determined that they do desire to adopt the means that are efficacious for the removal of international war, then that we shall not be discovered impotent, by virtue of constitutional limitations, to do the thing desired.

It is not a new question with us. We are familiar with the fact that now and then a great desideratum in our public life is found to be checked by our Constitution. We have only in the last few years gotten on the statute books an income-tax by virtue of changing the Constitution. We have changed the way in which you two gentlemen were elected, because it was thought desirable to do it, by a constitutional amendment. That is the kind of thing that we are presenting to-day for your consideration.

We can not claim for this proposal, Mr. Chairman, that it to-day has behind it, with full understanding, all of the sentiment which was behind the popular election of Senators, and which was behind the income tax; but we say that it is a growing sentiment. We say that we are going to make it grow all that we can; and that other people, working on somewhat different lines from our own lines, on lines which we think are not going to be efficacious, yet trending all in the same direction, are at work day and night on this subject. We say that perhaps the dreadful agonies in Europe will hasten this result as not a hundred years of discussion would have hastened it; and we say that when the public sentiment shall have been thus created, we do not desire to be impeded by the same formal handicap which delayed the establishment of the income tax and delayed the establishment of the popular election of Senators. That is all. A permission is granted to indicated parties to do the thing that is now so much under discussion.

That there is doubt about this question is indicated by the fact that it has been discussed on the platform known to this country as Lake Mohonk, by Mr. Taft and Mr. Bryan. I do not cite them as being authorities conclusive in my mind about anything, as I do not admit that anybody has conclusive authority in my mind about anything.

Nevertheless, they are two eminent Americans, known all over the world where political people follow us. They differ about this subject. When I say "this subject," I should premise by stating that they were considering the program of the League to Enforce Peace, and that Senator Borah seems to have properly interpreted the administration's announcements as being in line with that program.

Mr. Bryan says: "We must have a constitutional amendment." Mr. Taft says: "I think we can get along without it." I will show you in a moment his argument on the subject. I think it is fallacious. I happen to agree—I hope you will—with Mr. Bryan. I disagree with Mr. Taft. I can show you, I believe, that Mr. Taft simply did not think of certain implications in this whole thing that we are talking about which perhaps would have changed his view had he thought of them.

Now, Mr. Chairman, to make the argument more orderly, I am prepared to show by authorities that all treaties made by this Government are in fact limitable; that is, that you, the treaty-making power, can not violate the Constitution.

Senator OVERMAN. You mean that the treaty-making power is limited by the Constitution itself?

Mr. CROSBY. Yes.

Senator OVERMAN. In what way? I should like to hear your views about that?

Mr. CROSBY. Well, could you make a treaty with Great Britain providing that the presidential term should be six years?

Senator OVERMAN. No, because that is prescribed by the Constitution itself.

Mr. CROSBY. Absolutely. That is all the answer that is involved in this—that is, there are prescriptions in the Constitution which do limit the treaty-making power. We have, then, only to inquire, What are those prescriptions? Do they apply to this matter? Do they apply to any other matter that arises? They, in all cases, must be raised in our minds, and reviewed, and disposed of.

Senator SHAFROTH. Mr. Crosby, we have about three-quarters of an hour yet, and I think you had better go into those authorities, because there is a doubt in the minds of a great many people as to whether it is necessary. I formerly had that doubt in my own mind. It was not only a doubt, but I felt that the treaty-making power was great enough. I have changed my mind, however.

Senator OVERMAN. It was not contemplated that the treaty-making power would interfere with any of our domestic concerns prescribed by the Constitution.

Senator SHAFROTH. It is immaterial as to whether they are domestic or foreign.

Senator OVERMAN. So far as foreign matters are concerned, I do not think there is any limitation.

Senator SHAFROTH. There is in regard to the making of war, that power being vested in Congress alone.

Senator OVERMAN. The idea is that Congress, having made a treaty, will carry out the treaty.

Senator SHAFROTH. But no Congress is bound by the action of a prior Congress.

Mr. CROSBY. Then I will point out some of the other specific powers of Congress. I will read, if you will bear with me—they are

very short—the citations from the Constitution, so that they will be fresh in our minds.

Senator OVERMAN. If you have a statement prepared on that point it would be well for you to put it in the hearing, rather than to read it.

Mr. CROSBY. For the moment I will have to read just a word or two. What I want to call attention to, Mr. Chairman, is the mere citations from the Constitution.

The Congress has the power to declare war. It has also the power to raise and support armies, but the Constitution provides that no appropriation of money to that use shall be for a longer term than two years.

That is prohibitory. That is final, is it not, in the Constitution? What I submit is, that before you can make any substantial headway on a new international order, the other nations, not thus limited, must have more than a two-years' engagement from us in respect to the maintenance of some sort of a force. If it be a force of the kind that Mr. Taft's organization, the League to Enforce Peace, proposes, it will be a force still national, instead of truly international.

Let me say that in my judgment these various methods can be divided into two classes, one class being the thing, standing alone, that Senator Shafroth and I stand for. That is the class which sets up a true international force, turned over to the international body for its use and direction. The other is composed of various compromise measures endeavoring to keep the forces entirely within the control of the sovereign States as they now exist, but dedicating them, under certain emergencies, to international uses. That is the program of the League to Enforce Peace.

There is a broad distinction. I think that all those that lie this side of the radical step are going to be failures; but I am assuming that we will write down these inefficacious methods in some kind of a treaty. I then say that if you were Germany or Russia or England, and were putting your whole international relationships, and perhaps your existence, at stake in the matter, you would not be satisfied to deal with an organization which is prohibited by the express terms of the Constitution from maintaining any army longer than two years. I conceive that the fathers of the Constitution meant to require of Congress a fresh biennial discretion to be applied to this matter in this country.

Senator OVERMAN. That is the reason the Congress meets every two years.

Mr. CROSBY. Yes; and they did not want this particular thing, which they then so much feared, to be possible, namely, the establishment of a Regular Army for a period longer than the period of each congressional election. Hence, they prohibited Congress from making an appropriation for an Army bill for a longer term.

That prohibition would have to be evaded in some way; the discretion of Congress with respect to this two-years' appropriation would have to be absolutely stricken down in order to make an efficacious treaty; and in general, if we pass that detail, there is a true transfer of sovereignty in respect to the making of war and not making of war.

Mind you, Mr. Chairman, under the schemes which are in question we must not only be bound to make war upon the determination of an extra-national body, but we must be prevented by that same body from making war when we otherwise would want to do so. But are we then to say that that sovereign control of the war-making power, both in its positive and in its negative aspects, can be put in an extra-national body by the treaty-making power alone, when the Constitution, in line after line and in its whole spirit, contemplates that both the making of war and the not making of war shall be determined by Congress?

I do not think so. It would be such a subversion, such a destruction of the general sovereignty which was lodged by the States in the General Government under the existing Constitution, that it would be attacked by somebody, Mr. Chairman.

I know that Mr. Taft, in his statement which I can show you, cites one or two existing treaties as indicating that the Congress is bound to make war on contingencies not determined. He cites the case of Panama, whose existence we guarantee, and he cites the case of Cuba.

I want to say in the first place, with respect to such treaties as those, that they never have been challenged. They probably never will be challenged. They are only formal expressions of our Monroe doctrine, anyhow. In both cases we have these two little children by the hand. We say to Cuba, in the very act which gives her birth: "You shall do very much as we determine to do in your foreign affairs." As for the Panama Republic, we know that its whole gizzard and its backbone and everything about it is the canal, which is ours, and we did not intend that anybody should disturb that canal. But aside from any other question—and I do not mean to say that that would make it constitutional if it were otherwise unconstitutional—a number of such treaties, when they conform to the general sentiment of the country, will not be questioned, although they might in fact, let us say, be questioned.

But, Mr. Chairman, we are talking about an arrangement which, if made, will have arrayed against it a large and powerful minority, intent to defeat it by any means legally possible in this country. The sentiment will not be uniform for this thing. More than that, Mr. Chairman, if the sentiment were quiescent, let us say, at the time of making this treaty, the time will come when the United States, under such a treaty, will be called upon to do something which will probably arouse the indignation of every Senator in this Chamber when you and Senator Shafroth shall have gone; and they, sitting in your seats, will say: "Our predecessors had no right to do this thing." If we are required by an extranational power to make war or not to make war on some occasion when the sentiment of America as a whole shall have been aroused in the opposite direction, I say that then the question will be raised, if not earlier, as to whether the treaty-making power had or had not been exceeded. Men all over this country—your successors themselves—will raise the question as to whether you exercised your power properly, if you should exercise it to-day in the making of such a treaty, if they find themselves suddenly constrained to do a thing that violates everything that will seem at that time to be worth while in American sentiments.

That being the case, we want now to get rid of that difficulty. If we are wrong, thrash it out; clear it in some way. Of course the best

way to clear it, is to concisely grant by a new constitutional provision the indicated powers to do the thing in question. That is the best way to clear it, obviously—for us to adopt this amendment as a part of our Constitution. Then it is beyond doubt. Another way to clear it measurably would be for this sort of discussion to continue—to continue not merely in this room, but in the Senate; to continue in the House; to continue to such an extent over the country that foreign powers and our own people would be put on notice, perhaps, that Mr. Bryan was wrong and Senator Shafroth was wrong. All right; that is possible. I do not think it is possible to determine it absolutely, but I mean to say, you might register, after discussion throughout the country, a sort of an informal interpretation which we might hold as binding upon our descendants, so that we should not be put in the position, Mr. Chairman, which I hope we shall never be put in, of failing to carry out a treaty once solemnly made.

In order that we may be protected from that probability in a treaty which is going to be so full of questions of the highest import and of the greatest passion of which the human mind is capable, let us make that treaty rest upon indisputable constitutional authority. That is the claim we make now. Let us say that the Supreme Court might possibly, were this case presented to them, rule that you can do the thing that we imagine you can not do; but we can not get it before the Supreme Court in that way. They do not take jurisdiction of theoretical cases. In the meantime, the question is in doubt, and that you can not change.

This Senator of the United States—Senator Shafroth—introduces a resolution indicating his view. Mr. Bryan has indicated his view. In the short time and in the small horizon of discussion which the matter has had, I chance to remember that the American Peace Society, through its organ here, "The Advocate of Peace," has said in most specific specific terms that in its judgment it was most essential that this thing should be done. We have not had a great deal of publicity about it. We are only a small number of men attending to this end of this business. It is the drudgery end. It is a great deal easier to go out on a platform and orate about "the blessings of peace." And I am supposing that when these legal, dry, rather forbidding constitutional questions are raised that this is the place where we must raise them and thrash them out.

Who will have the final authority to say: "The treaty-making power has the right to transfer this enormous fraction of the sovereignty of the American people to an extra-national body? Who shall say that it will bind you and will bind me? What will you have in the Chamber of the Senate when this treaty comes before you for discussion? If you will recall, Mr. Chairman, the discussions that have already raged around such relatively small affairs as the Bryan peace treaties, so-called, and some of the arbitration treaties; if you will remember what has gone on in the Senate, then you will realize that when there shall be presented to you a treaty revolutionary in character, a treaty of a kind such as the world has never seriously considered, every one of the questions which now seem rather irritating to those who do not like to see difficulties raised, will arise in your minds. They will arise very particularly in the minds of men such as Senator Borah, whom I again cite because he is the last speaker on the subject, who says that in his judgment there is moral

treason entertained by those who entertain the views that Senator Shafroth and I entertain. He has said that in a perfectly proper way. I am sure Senator Shafroth and I can sit down and discuss the matter with him, and it will be discussed in the most amiable fashion; but he obviously feels that this very transfer to which the President is in some terms referring, is a thing to him most objectionable; and there are many thousands like him.

I do not know what your view will be, Mr. Chairman, when you shall have pursued this matter further in your own mind. You may stand with Senator Borah and say, "No; I am absolutely opposed to ever yielding the sovereign power of the United States in the matter of war-making to any extranational body." Then, if you thus oppose it, I believe you also will want to know, if there be a majority for the plan in the Senate Chamber, whether that majority is acting within its constitutional rights. You will raise this question, if you are in the minority on this general subject; and if you do not do it, somebody else will.

Suppose a treaty of this sort is put through, with a minority opposed to it, which must be, of course, a relatively small one under the Constitution. Suppose the other House is rampant the other way. It will be an unfortunate thing for this country to find itself nominally bound—for it would be nothing else but a nominal binding—by what a great many people have considered to be an unconstitutional treaty which undertakes to change the world, Mr. Chairman. This is not a holiday performance that is being discussed—no. It is so new that there is no precedent on earth for it. Then do you mean to say we are to drift along with a Constitution which says thus and so, thus and so, and not find our bearings as to whether we can help change the world, make a new order in international affairs, and bind nations to fight battles in which heretofore they have had no manner of interest?

I say the proposal must be subjected to every possible criticism that we can make, and that there will be powerful opponents to the very things that Senator Shafroth and I think so important and desirable. We hope you will think as we do, but when you have been converted, if you need conversion, then somebody else will be against the three of us, and so it will be with vast numbers of men opposing each other. If we can have our way finally, Mr. Chairman, we must be able to express our will by methods which will defy criticism from the legal or constitutional point of view, or otherwise the great work, the magnificent edifice which we hope to erect, will be on a foundation of sand, and it will be attackable by everybody in the country who opposes us.

I want to call attention to another ominous sentence in Senator Borah's speech. I have not the text here; no matter; I shall not misquote him substantially. He did not seem to understand or think of the limitations which I am talking about to-day, but he had in mind the limitations which we want to avoid considering. He said: "Yes, indeed; you may make these obligations for war making within the quiet walls of the court, but those who sit in those quiet walls are not those who fight the battles, and the people of the United States, when ordered to do these things, will take the matter in hand and decide for themselves."

What is the interpretation of that? I do not mean to be holding Senator Borah to strict account for all the implications that are in that statement, but I know what he means in general, and he does not stand alone, Mr. Chairman. There are millions—no; there are not millions who think at all about anything—but there are thousands of thinking men in this country who believe that we should not do this thing. We hope to convert some of them, but there will be some unconverted. What he says is this: "Go ahead and make your treaties. Now, see whether the American people will stand by them. They are to do the fighting."

We do not want that, Mr. Chairman. If we make a treaty so grave that it is of a gravity greater than that which weighed upon our forefathers when our Constitution was organized, if we enter into a treaty which will be the birth of a new order in the whole world, Mr. Chairman, we want to be bound by it by chains that can not be broken by claims made as to the unconstitutional procedure of the treaty-making power. But there it was, the thought in that Senator's mind: "Do this thing which I consider moral treason, and you will see whether the people will stand behind you." Now, I say that we want to be bound, if we ever are bound, irrefutably. That is what we want. We want it clear.

As to the authorities in regard to the treaty-making power in general, I may say that a very old authority, Vattel, is quoted as follows:

But all rulers of states have not a power to make public treaties by their own authority alone. Some are obliged to take the advice of a senate, or of the representatives of the nation. It is from the fundamental laws of each state that we must learn where resides the authority that is capable of contracting with validity in the name of the state.

That I cite as indicating that each nation does investigate your power when you as a Senator, cooperating with the President, undertake to make a treaty. That is the ancient rule.

Then Halleck says:

The treaty-making power of the state is determined by its own constitution and fundamental law.

Obviously so. If it were not so, Mr. Chairman, truly all the set-up of the Constitution would be quite in vain. Infinite care was given to distribute powers; but if the President and two-thirds of the Senate can bind us forever morally—that is, the obligation in any treaty is only moral, but that is what we are talking about; we do not want to have treaties that we will not stand by—if you gentlemen can do that if you choose, what in the world was the use of setting up the Constitution? Obviously, none. So it is very ancient theory that there are fundamental rules limiting this power.

Mr. Charles Henry Butler says in his work on "The Treaty-making Power of the United States," volume 1, page 120:

Notwithstanding the great constitutional liberties of England, the treaty-making power still remains in the British Crown, and, according to Halleck, "in Great Britain the treaty-making power is a branch of the prerogative of the Crown, (and) has in theory no limits." He, however, qualifies this by the statement that Parliament, by its power of legislation, may render a treaty ineffectual by refusing either to appropriate the money or to enact the legislation necessary to carry it into effect.

Mark you, Mr. Chairman, that means that you and I, having been put on notice by the general character of the British Government and our knowledge of it, have no right to bring a charge of disloyalty

against the British people if a treaty is made which requires acts of Parliament to follow it up, and those acts are never executed. We are put on notice that that is a part of the process ere the whole body of the people shall be bound; and you can readily see that if the Crown to-day, without reference to Parliament, should undertake, let us say, to set aside the right of trial by jury in England or to change the line of succession, we know that we would not believe that the British people were disloyal if they refused to carry it out. There are limitations to the treaty-making power.

A well-known authority on the subject—

Senator SHAFROTH. Mr. Crosby, as we only have about 15 minutes left, I think perhaps you could have the privilege of putting whatever authorities you may wish to refer to and comment on in the record.

Senator OVERMAN. Yes; you can put them in the record.

Senator SHAFROTH. Then you can devote your time to whatever comments you want to make.

Mr. CROSBY. Very well; then I will insert the others in the record. I am going to read these few lines, because in a word this states the case very well:

The power—

Says William A. Duer, referring to the treaty-making power—

must, indeed, be construed in subordination to the Constitution; and however, in its operation, it may qualify, it can not supersede or interfere with any other of its fundamental provisions, nor can it ever be so interpreted as to destroy other powers granted by that instrument.

I perhaps could not have the matter more tersely stated than it is stated by that authority. Others that will be given to the reporter are found in the same line.

Mr. Taft held that under the program of his league it would not be necessary to amend the Constitution, because he said Congress would in fact not be deprived of its power to declare war; that as a matter of fact it would have to declare war if the emergency indicated should arise, and the extra-national body should say the word. Well, technically, one may say yes; but shall you agree that a power has been preserved, if the discretion connected with it has been utterly destroyed? Certainly not.

Moreover, Mr. Taft omitted the consideration of the other side of the war-making power—that is, the discretion not to make war—and under certain emergencies which may arise in these international things, we may desire not to make war. Now, the Constitution to-day leaves the discretion about that to Congress; but under the predicated system of affairs Congress will not only have the empty husk of right to declare war, but will be bound to exercise it, against its discretion at that moment. Is that a fulfillment of the constitutional functions of the House when joined as a part of Congress? I think not.

Mr. Taft also neglected, as nearly all writers on this subject have neglected, to consider another important phase of this matter, and that is a way of getting out of war. They presume the nations to be launched into a war by this combined body, whatever it is, outside. We shall not for the moment go into a discussion of its character; but we are all launched. "Charge, boys! There you go!" Now, what about stopping it? Why, you are cutting off your own power,

the treaty-making power, from making peace. The power of making peace is with the President and Senate; but you have got to abrogate, yourself—and I do not believe you can do it—to destroy utterly, the discretion of your successors in regard to peace treaties.

You can understand that if six of us start in licking Smith, and have Smith's farm to divide at the end, we have got to have an agreement not to stop separately and take separately from Smith's farm. Imagine, if you please, that our war against Spain had been set going by an international mechanism of the kind in question. Imagine that we should have been ordered to play exactly the same military rôle that we did play. Imagine that which would be highly probable were an international body in existence—that France had been ordered to attack Spain at the same time on land and in her own proper territory.

Well, the thing drifts along. We seize the Philippines, and get them in control. We clear the Spaniards out of Cuba, and we say: "Oh, well, we are quite through. We want to stop now. We are going to take the Philippines. We are going to take Cuba under tutelage and do as we choose about it. We are going to administer that farm, and we are going to take the other one, body and breeches." Well, do you suppose that the other European power or powers who would have joined with us in the fight against Spain would be satisfied with such an independent termination of the war?

I say no. I say, Mr. Chairman, that the implications of all this talk about a durable peace and interaction of nations on a new basis are so grave—all their implications have not yet been understood even by men of great renown.

Therefore I say, when you consider all the implications of this matter, you discover now that probably, to make any effective arrangement, you have got to cut off the treaty-making power in respect to the closing of a war, which is now reposed by the Constitution in the Senate and the President.

So in all respects, both as to the original making or not making of a war, and next as to the closing of the war, we must have a new power given, because we are about to do something frightfully revolutionary. The proposed amendment clears that ground and makes it possible for us to act if we desire to act. Its exact phraseology is, of course, subject to change.

Mind you, Mr. Chairman, let me again clear the way: I am one of those working to produce that revolutionary state of affairs; but I say that it was not the state of affairs contemplated by the framers of the Constitution. I am extremely anxious, as a citizen of the United States, that when great reforms come—and I am unfortunate in having my mind filled with several radical reforms—when those reforms run counter to the Constitution I want them to be arrested; I want them to be stopped until the Constitution is correspondingly changed. That is my view of the best thing for this country.

My heart is all in this international work; I do not know what sacrifices I might not be willing to make to carry it on; but I would not want to see the dream of my life realized in the establishment of the institutions which are portrayed in this earlier resolution introduced by Senator Shafroth if I believed it were done in contravention of the Constitution of the United States. There is something very precious to the world at large and to us, in respect to observing the in-

licated ways of modifying our Constitution when we want to do things which were not contemplated, or do things in ways which were not contemplated, by the founders of this Government. That is the reason why I urge so strongly that we should not go in doubtful paths where the Constitution seems to lead in other ways. That is the reason why I do not want to see the logic of Mr. Taft taken as the controlling logic of the Senate and of the President as a treaty-making power—that it is sufficient if you leave the empty husk of an action to Congress. I do not want to see it that way.

I do not suppose, Mr. Chairman, that you will care to have me read from Mr. Taft's statement.

Senator OVERMAN. If you desire to put it in, you may do so.

Mr. CROSBY. It would be best, I think, since I have referred to it, to let me put in at least those portions of it which bear directly upon the argument I have made. I have felt it necessary to make this reference to it because Mr. Taft's words carry a thousand and ten thousand fold more weight, of course, than mine would. That goes quite without saying. He has made this public utterance, and it will satisfy a great many people who are in the habit of taking their views from men of certain eminence. Others of us criticize everybody, as we feel it our duty to do; and when making this reference I want it, therefore, to be shown that I am taking it textually from his address.

Senator SHAFROTH. Right here, Mr. Chairman, I should like to have the permission of the committee, when Mr. Crosby and I go to correcting the notes that are taken here, that he and I may add whatever we care to add with relation to the subject.

Senator OVERMAN. Very well. Whatever Senator Shafroth and Mr. Crosby wish to add may be incorporated in the record.

Mr. CROSBY. Mr. Chairman, the thing that Senator Shafroth and I have been aiming at in the earlier resolutions, as I have tried to indicate, is the more radical of all the plans that are proposed; but I have talked a great deal about the plan of the League to Enforce Peace, because that is the one most in discussion to-day and the one which seems to be in the administrative mind to-day. The thing that I want to impress upon your minds, if I can, is that even that plan will yet require, in order that it shall be legally put upon paper, these changes in our Constitution, because the minimum thing that is to be aimed at, so far as I can learn from the utterances of the various gentlemen to whom I am referring, is a transfer of the war-making and peace-making power of the United States under given emergencies to an extranational or supernational body. That transfer, in my judgment, can not be made by the treaty-making power under the existing Constitution. That is the question which we submit to the committee to-day.

The questions are, do you or do you not believe that there is any doubt as to the power of the Senate and the President, combined, to do this thing? Second, if there be a doubt, do you want to remove it? That raises in your minds the question as to whether you want to help along this movement. You can block this movement toward international peace, so far as we are concerned, by refusing this amendment. I think the handicap is so great that if you do not remove it, all the opponents of the establishment of an international

tribunal with power to enforce its decrees will be so strengthened that we shall have a long and a weary and a defeated way.

Therefore, there is something in your minds to be determined. Are you an opponent of this thing? If you are, you will say, "It is just as well to let those dreamers have this constitutional handicap to wrestle with." That is what I think I should do if I were opposed to it. If I had a deep, conscientious feeling that all these dreams and these effort about international organizations were wrongful, then I, as an American, would say, "Well, I am very glad that the forefathers fixed it up without thinking about it. They did not know anything about it. The thing was not under discussion until 1815 in any general way; but I am glad they stumbled into it in such fashion, and that these long-haired people who want an international order of things may thus be defeated."

I hope, however, that the Judiciary Committee will feel that it is desirable that the shackles which rest upon us in respect to this matter shall be stricken off; and when the world shall be ready for it—oh, I do not know, Senators, when the world will be ready for it—but when the world shall be ready for it, that we shall not be found impotent to join in that which shall then be considered as the very hope and the tabernacle of the people of the world. We are those who should lead. We are ready to lead, probably. We are conditioned to lead in many ways. Now, I do not want us to be handicapped by a thing resulting from the mere lack of thought on this subject by our forefathers.

(Thereupon, at 12 o'clock, the subcommittee adjourned.)

(The various citations referred to by Mr. Crosby are as follows:)

Story, in his Commentaries, speaking of treaties in general, says: "It is, therefore, indispensable that they should have the obligation and force of a law, that they may be executed by the judicial power, and be obeyed like other laws. This will not prevent them being cancelled or abrogated by the nation upon grave and suitable occasions; for it will not be disputed that they are subject to the legislative power, and may be repealed, like other laws, at its pleasure, or they may be varied by other treaties."

Prof. John Norton Pomeroy, after speaking of "the unlimited extent and transcendent importance of this (treaty-making) power," is quoted by Mr. Charles Henry Butler, as "expressing, however, an opinion that there are some implied limitations, as for instance the deprivation of Congress, or the Judiciary, or the President, of any powers which are granted by the Constitution, or any general charge in the form of government of this country * * *."

John Randolph Tucker writes: "A treaty, therefore, can not take away essential liberties secured by the Constitution to the people. A treaty can not bind the United States to do what their Constitution forbids them to do. We may suggest a further limitation: A treaty can not compel any department of the Government to do what the Constitution submits to its exclusive and absolute will."

John C. Calhoun says: "The treaty-making power is limited by all the provisions of the Constitution which inhibit certain acts from being done by the Government. It is also limited by such provisions of the Constitution as direct certain acts to be done in a particular way, and which prohibit the contrary * * *."

Story, in his "Commentaries," says: "The treaty-making power is necessarily and obviously subordinate to the fundamental laws and constitution of the State, and it can not change the form of the government, or annihilate its constitutional powers."

Dr. Ernest Meier, of Leipzig, is cited by Wharton in his Digest as "a German author, who has given to the subject a degree of elaborate and extended exposition which it has received from no writer in our own tongue." Dr. Meier is then quoted, in substance, as saying: "The Constitution gives Congress the control of the Army. Participation in this control would be snatched from the House of Representatives by a treaty with a foreign power by which the United States would bind itself to keep in the field an army of a particular size. The Constitution gives Congress the right of declaring war; this right would be illusory if the President and the Senate could by a treaty launch the country in a foreign war."

Justice McLean, in *Turner v. American Baptist Missionary Union*, says: "A treaty under the Federal Constitution is declared to be the supreme law of the land. This unquestionably applies to all treaties, where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and can not be the supreme law of the land, where the concurrence of Congress is necessary to carry it into effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect."

Mr. Justice Daniels, of the Supreme Court of California, says: "Laws of the United States, in order to be binding, must be within the legitimate powers vested by the Constitution. Treaties to be valid must be made within the scope of the same powers; for there can be no 'authority of the United States,' save what is derived mediately or immediately, and regularly and legitimately, from the Constitution."

Mr. Justice Swayne, in *The Cherokee Tobacco*, says: "It need hardly be said that a treaty can not change the Constitution, or be held valid if it be in violation of that instrument."

Mr. Justice Field, in *Geofroy v. Riggs*, said, in substance: "That while the treaty-making power of the United States extended to all proper subjects of negotiation, and is in terms unlimited, except by those terms which are found in the instrument itself against the action of the Government, or of its departments, or from those arising from the nature of the Government itself, and that of the States, it would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the Government or in that of one of the States, or a cession of any portion of the territory of the latter without its consent."

All the foregoing references are found in Chas. Henry Butler's *Treaty-making Power of the United States*.

The following quotations from W. A. Phillips in "The Confederation of Europe," bring into view some of the engagements considered necessary by a league or alliance which aimed not only at defeating a particular enemy—Napoleon—but also at protecting the peace which was to follow his defeat. Chiefly moved thereto by the lofty views of Alexander, Czar of Russia, the allied monarchs aspired, or seemed to aspire, to realize "a durable peace," and the political talk of the day was much in the same strain as that now featured in the headlines of our journals. We may learn from these extracts, (a) the probable requirement of nullifying the discretion of Congress as to the size of our armies, both as to minimum and maximum strength, and as to the length of time for which a given force is to be maintained; (b) the probable compromise or surrender of the President's constitutional rôle as Commander in Chief of the Armies and Navies of the United States; (c) the paralyzing force of jealousies produced by national troops acting as an international instrument; (d) the revolutionary nature, as viewed by English statesmen, of any continuing and general engagement to act in concert with other powers in respect to war making.

Beginning at page 77:

"Since the treaty of Chaumont is the foundation upon which the 'Confederation of Europe' in all its subsequent phases ultimately rested, it will be well to examine its provisions in some detail. The preamble declares its object to be 'to draw closer the ties which unite (the powers) for the vigorous pursuit of a war undertaken with the salutary object of putting an end to the misfortunes of Europe * * * of assuring the repose of Europe by the reestablishment of a just equilibrium * * * and of maintaining against all attacks the order of things that shall be the happy outcome of their efforts.' The treaty, that is to say, is directed to two ends, the one temporary and particular, i. e., the successful prosecution of the war with France, the other permanent and general, i. e., the collective protection or guaranty of territorial and other arrangements agreed upon as the result of successful war. With the articles of the treaty falling under the first of these heads we need not here concern ourselves. Of the articles falling under the second head, the most important are the fifth, sixth, seventh, and sixteenth.

"Article V provides that the allies will, without delay, concert as to measures for preserving the peace when established, and for mutual protection against any attack by France. Article VI provides, in such an event, primarily for 'amicable' intervention. Article VIII stipulates that such amicable intervention having failed, each of the contracting powers shall place 60,000 men in the field. To save waste of time in such an emergency, the question of the supreme command and of the pay of the troops is determined. Article XVI, which from our present standpoint is the most important, runs as follows:

"The present treaty of alliance having for its object the maintenance of the balance of Europe, to secure the repose and independence of the powers, and to prevent the invasions which for so many years have devastated the world, the high contracting parties have agreed among themselves to extend its duration for 20 years from the

date of signature, and they reserve the right of agreeing, if circumstances demand it, three years before its expiration, on its further prolongation."

Beginning at page 177:

"And Castlereagh reported that both the Emperor and Count Capo d'Istria were, in conversation, disposed to push their ideas very far indeed, in the sense of all the powers of Europe being bound together in a common league, guaranteeing to each other the existing order of things, in thrones as well as in territories, all being bound to march, if requisite, against the first power that offended, either by her ambition or by her revolutionary transgressions. It is not surprising that to Castlereagh even the blessing of perpetual peace would seem too dearly bought at the price of subjugating Europe to an international police of which the undiminished armies of Russia would form the most powerful element. As Castlereagh wrote later (Nov. 9), when the proposal for a 'universal guaranty' had reemerged in another form, 'it was opening up to such a power as Russia * * * an almost irresistible claim to march through the territories of all the confederate States, to the most distant points of Europe, to fulfill her guarantee,' a claim, it may be added, which Alexander actually did make in connection with the revolutionary troubles in Spain in 1820.

"Yet the Russian Emperor, in pressing his scheme, was not unreasonable in believing that he was but carrying to their logical conclusion principles to which the British Government already stood committed. British ministers rightly held that under the actual conditions of Europe the maintenance of the alliance was essential—they had committed themselves by Article VI of the treaty of November 20, 1815, to the principle of holding 'at fixed intervals' meetings 'consecrated to great common objects'—they had even allowed the Prince Regent to express his pious assent to the lofty doctrine of the Holy Alliance—they were vividly conscious of the necessity for 'calming the alarm of the other powers,' to which the Kings of Sweden and Wurttemberg gave vigorous expression during the sitting of this conference. The formation of a universal union, as foreshadowed by the Holy Alliance, would at once give to the periodic meetings greater weight and disarm all opposition by giving to all States, great and small, a share in them—peace, the object of the quadruple alliance, would be secured by making it impossible for any power to break it, since any attempt to do so would bring down upon it the armed forces of all the rest. Castlereagh, however, was less impressed by the excellence of Alexander's logic than by the danger of applying its conclusions. A limited alliance for certain defined purposes was one thing; a universal union, committed to common action under circumstances that could not be foreseen, was quite another. The admission into the councils of Europe of a number of small States would, moreover, open the door to intrigues, the perils of which were minimized in the narrower alliance."

Beginning at page 225:

"Of what," asks Castlereagh, 'is the protocol a draft? Of a reasoned basis for the interference in Naples? Or of a general treaty to which the adherence of the other courts is to be invited?' In the latter case the question assumed a character such as must necessarily awaken the attention of all European States with regard to its principles as well as its provisions. It raised questions both as to the position of the contracting powers toward each other and as to their relation to the independent States which were not parties to the obligations of the alliance. It was impossible not to be alarmed by the wide and sweeping powers claimed for the allies by the protocol—powers which he denied to have any basis in existing treaties. The treaty of November, 1815, only stipulated that, in the event of a revolutionary convulsion in France, the powers were 'to deliberate together' with a view to concerting measures to secure their common safety; but the fifth article of the protocol proceeds at once to recognize their authority to place armies of occupation in such of those States as the alliance may deem to require such a precaution. If this could not be based upon existing treaties, was it proposed to invite all other States to accede to this league, and thus by their voluntary consent to submit themselves in such cases to the jurisdiction of the alliance? Could it be supposed that all the States of Europe would choose to accede to such a system, and if not, what was to be the position of the States that did not accede? After pointing out the disastrous effect of this system on the relations between the sovereigns and their peoples, Castlereagh goes to consider its effect on the relations of the powers of the alliance to each other. The rights claimed under the protocol, he said, were presumably to be 'reciprocal between the parties.' Were, then, the great powers of Europe prepared to admit the principle of their territories being thrown open to each other's approach upon cases of assumed necessity or expediency, of which not the party receiving aid, but the party administering it, was to be the judge? As for Great Britain, any minister who should recommend the King to sanction such a principle would render himself liable to impeachment, and the British Government not only dissented from it, but protested against any attempt

to consider it, under any conceivable circumstances, as applicable to any of the British dominions.

"It is proposed to create a confederacy for the exercise of a right which, though undoubtedly appertaining, upon the principle of self-defense, in extreme cases, to each particular State, has never yet, as a general measure, been made the subject of a diplomatic regulation or conjoint exercise. It was proposed, he said, to assume on the part of the alliance a sovereign power over the other States of Europe, on the analogy of the German confederation. But in the German confederation the power was exercised, not by its most powerful members but by the confederation itself, represented in its Diet. In the present case there was no such regulation, and sooner or later, therefore, the claims of the alliance would provoke counter alliances, thus defeating the very objects for which they were advanced. 'There are extreme rights to which nations as well as individuals must have recourse for their preservation and for the exercise of which no legislature can provide. The extreme right of interference between nation and nation can never be made a matter of written stipulation or be assumed as the attribute of any alliance.' "

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"To Canning it seemed that France, having gained what she could from the alliance, was now, in however mean a way, bent on asserting her independence, and he rejoiced in the fact. 'The issue of Verona,' he wrote to Bagot on January 3, 1823, 'has split the one and indivisible alliance into three parts as distinct as the constitutions of England, France, and Muscovy. * * * Villele is a minister of 30 years ago—no revolutionary scoundrel; but constitutionally hating England, as Choiseul and Vergennes used to hate us, and so things are getting back to a wholesome state again. Every nation for itself and God for us all. Only bid your Emperor be quiet, for the time for Areopagus and the like of that is gone by.' "

The constitutional provisions chiefly involved in Mr. Crosby's argument are the following:

POWERS OF CONGRESS.

Art. I, sec. 8.—"Provide for the common defense and general welfare of the United States."

Art. I, sec. 10.—To define and punish piracies and felonies committed on the high seas and offenses against the law of nations.

Art. I, sec. 11.—To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

Sec. 12.—To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years.

Sec. 13.—To provide and maintain a navy.

Sec. 14.—To make rules for the government and regulation of the land and naval forces.

Sec. 15.—To provide for calling forth the militia, to execute the laws of the Union, suppress insurrection, repel invasions.

Sec. 18.—To make all laws necessary and proper to carry into execution the foregoing powers. * * *

POWERS OF THE PRESIDENT.

Art. II, sec. 2.—The President shall be Commander in Chief of the Armies and Navies of the United States and of the militia of the several States when called into actual service of the United States.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.

POWERS OF SUPREME COURT.

Art. III, sec. 2.—The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.

LAWS OF THE UNITED STATES.

Art. VI, sec. 2.—The Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land.

The following quotation from Mr. Taft's address is that referred to in the hearing:

I come now to the other objection. The third plank of the platform is as follows: "Third. The signatory powers shall jointly use forthwith both their economic and military forces against any of their number that goes to war, or commits acts of hostility, against another of the signatories before any question arising shall be submitted as provided in the foregoing."

It is objected to this clause that it violates the Constitution in that the effect of such a treaty signed by the United States would take away from Congress the power conferred upon it by section 8 of Article I, to declare war.

I had the pleasure and privilege of hearing Mr. Bryan advance this argument at the Lake Mohonk conference. He said that we should need an amendment to the Constitution before we could agree to any such provision. He said that in order to carry out the provision we must have a joint council of the powers to determine when the time had arrived for military action and war, and that this would substitute the action of the council for the constitutional discretion of Congress. I venture to think that this view is wholly without foundation. Although it is not necessary. I am willing to accept the assumption that some kind of council would be appointed by the powers to make the announcements when the time had come for the use of economic and military forces against the recalcitrant member. Does that take away from Congress the power to declare war? It does not. If the war is a foreign war, it could not be begun under the Constitution until Congress had declared war. The President would not be authorized to direct the Army and the Navy to begin war until Congress had declared it. What, then, would be the situation if the fact were announced upon which the obligation of the United States to make war arose under this treaty? It would be to make war by constitutional means; that is, by the preliminary declaration of Congress that war existed. Congress might decline to exercise that power and refuse to declare war. What would be the effect of that? It would merely be a breach of faith on the part of Congress, and so a breach of faith on the United States and we would not go to war. The treaty-making power under the Constitution creates the obligation to declare war in certain contingencies. That obligation is to be discharged by Congress under its constitutional power to declare war. If it fails to do so, and thus comply with the binding obligation created by the treaty-making power, then it merely breaks the contract of the Government. It is left to Congress to carry out that which we in a constitutional way have agreed to do. Thus to impose in a constitutional way by treaty an obligation on Congress is not to take away its power to discharge it or to refuse to discharge it.

In 1904 we entered into a treaty with the Republic of Panama, the first article of which is:

"The United States guarantees and will maintain the independence of the Republic of Panama."

What is the necessary effect of this guaranty? It necessarily means that if any nation attacks Panama and attempts to take from her territory or to subvert her government, the United States is under treaty obligation to make war to defend Panama. Was it ever supposed that such an obligation took away from Congress the power to declare war? This treaty obligation makes it the duty of the Government to declare war under certain conditions that may arise, creates a contract obligation to the Republic of Panama that it shall do so, and this duty can only be discharged through the action of Congress in declaring war. Does that deprive Congress of its constitutional power to declare war? It seems to me the question answers itself.

In our relations with Cuba we find in the present treaty:

"ARTICLE I.—The Government of Cuba shall never enter into any treaty or other compact with any foreign power or powers which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign power or powers to obtain by colonization or for military or naval purposes or otherwise, lodgment in or control over any portion of said island."

ART. II.—"The Government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of

a Government adequate for the protection of life, property, and individual liberty, and for discharging the obligation with respect to Cuba imposed by the treaty of Paris on the United States now to be assumed and undertaken by the Government of Cuba."

ART. III.—"To enable the United States to maintain the independence of Cuba and to protect the people thereof, as well as for its own defense, the Government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations at certain specific points to be agreed upon with the President of the United States."

It is quite clear from these three articles that the Government of the United States binds itself to maintain the independence of Cuba and to exclude other Governments from lodgment in the island. Now, if any Government attempts to filch territory from Cuba or to subvert the Government, it becomes the duty of the United States to make war and defend against such invasion. Does this treaty obligation thus created take away from Congress the power to declare war? It only creates the obligation on the part of the United States to wage war, and in discharging this obligation Congress must act or the Government must be recreant to its agreement. Thus, by reason and precedent, it would appear clear that this third plank of the platform of the league is not in any way an attempt to take from Congress the power which it has to declare war under the Constitution, and the suggestion that in order to carry out such an obligation on the part of the United States it would be necessary to amend the Constitution grows out of a confusion of ideas and a failure to analyze the differences between the creation of an obligation of the United States to do a thing and the due, orderly, and constitutional course to be taken by it in doing that which it has agreed to do.





